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IN THE

Supreme Court of the United States

MODERN LIFE INSURANCE COMPANY,

Appellant,

—v.—

BERNARD N. WOLFMAN,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The appellant, pursuant to United States Supreme Court Rules 13 and 15, submits this statement to show that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question and should exercise such jurisdiction.

Opinion Below

The opinion of the Supreme Judicial Court is reported as *Wolfman* v. *Modern Life Insurance Co.*, 1967 Mass. Advance Sheets 637, 225 N.E.2d 598 (1967) and is printed in the appendix hereto. (Pp. 1a-13a *infra*). The Superior Court filed no opinion. Its Findings and Rulings are printed in the appendix. (Pp. 13a-14a *infra*).

Jurisdiction

(i) Appellee, as assignee of a life insurance policy issued by appellant, brought an action to recover the proceeds of the policy in the Superior Court of Suffolk County, Massachusetts, under Section 2 of the Massachusetts Unauthorized Insurers' Process Act, G. L. c. 175B.

In a special appearance, appellant contested the Superior Court's jurisdiction over appellant. The Court overruled appellant's plea to the jurisdiction but thought that the propriety of its ruling ought to be determined by the Supreme Judicial Court and therefore reported the case to that Court.

The Supreme Judicial Court held that appellant's activities were within the compass of G. L. c. 175B and that the statute as thus applied to appellant was not repugnant to the Constitution of the United States.

(ii) The judgment of the Supreme Judicial Court affirming the decision of the Superior Court overruling the plea in abatement was dated April 7, 1967, and was entered on April 7, 1967. No application for rehearing was made. The notice of appeal to this Court was filed on July 6, 1967 in the Suffolk County Superior Court.

(iii) Jurisdiction of the appeal is conferred upon this Court by 28 U.S.C. § 1257(2).

(iv) The following authority, among others, sustains the jurisdiction of this Court in cases where, as in the instant case, a state court has affirmed the applicability of a state enactment to appellant's circumstances and has held the statute valid under the United States Constitution as thus applied:

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282 (1921).

The following authorities sustain the proposition that this was a final judgment within the meaning of 28 U.S.C. § 1257(2):

Rosenblatt v. *American Cyanamid Co.*, 86 S. Ct. 1 (1965);
Mercantile National Bank v. *Langdeau*, 371 U. S. 555 (1963);
Local No. 438 v. *Curry*, 371 U. S. 542 (1963).

(v) The statute involved, Section 2 of G. L. c. 175B, provides as follows:

"Any of the following acts in this commonwealth, effected by mail or otherwise, by an unauthorized foreign or alien insurer: (1) the issuance or delivery of contracts of insurance to residents of this commonwealth or to corporations authorized to do business therein; (2) the solicitation of applications for such contracts; (3) the collection of premiums, membership fees, assessments or other considerations for such contracts; or (4) any other transaction of business, is equivalent to and shall constitute an appointment by such insurer of the commissioner of insurance and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contracts of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this commonwealth upon such insurer."

Question Presented

Are traditional notions of fair play and substantial justice offended when a state, by an act of its legislature, permits its courts to assume personal jurisdiction over a foreign life insurance company not authorized to do, nor doing, business in the state in an action brought by a resident assignee of a policy issued by the company to recover the proceeds of the policy, where:

(1) the insured, who was not a resident of the forum state, applied for the policy and underwent a physical examination in the insurer's home state, received the policy there, obtained the assignment form and a form of application for reduction of the face amount of the policy there, and only then went into the forum state, where he assigned the policy to secure a loan;

and where

(2) the only dealings, apart from premium payments, between the insurer and the assignee were the mailing of the executed forms by the assignee to the insurer, who returned them to the assignee, and a series of communications, initiated by the assignee, during which the mechanics of the assignment, the reduction of the face amount of the policy and the method of premium payment were discussed?

Statement of the Case

Defendant, Modern Life Insurance Company, is a New York corporation. (Op., p. 1a *infra*). Its office is located in the City of New York. (Op., p. 2a *infra*). It has never done business in Massachusetts and is not authorized to do business there. (Op., p. 5a *infra*; Exh. "2", p. 1).

On March 18, 1964, John Stricker, a Maryland resident, submitted an application for a $50,000 policy to defendant at its home office in New York City through an insurance broker there. (Op., p. 2a *infra*). Stricker underwent a medical examination in New York City. (*Ibid.*). He represented in his application that he did not use alcoholic stimulants to excess, did not suffer from any of the medical conditions set forth in the application and had not been examined or treated by a physician during the preceding five years. (Exh. "2", p. 2).

The policy (Modern Life Insurance Company Policy #1942) was delivered to the insured by defendant in New York City through the same broker on or about March 21, 1964. (Op. p. 2a *infra;* Exh. "2", p. 3). The date of issue appearing on the face of the policy was March 20, 1964. (Exh. "2", p. 3). Shortly thereafter the insured, through the same broker, asked defendant for a form of application for reduction of the face amount of the policy and an assignment form. (Op., p. 2a *infra*). They were delivered to him in New York City. (*Ibid.*).

On March 26, 1964, plaintiff, Bernard N. Wolfman, called defendant from his office in Boston, Massachusetts. (*Ibid.*). He explained to defendant's registrar, Albert A. Sterlini, that he was going to take an absolute assignment of the policy and inquired as to the number of the policy to be inserted in the assignment form. (*Ibid.*). He asked that the policy be sent to him at his office address in Boston. (*Id.*, p. 3a *infra*). He was advised by Sterlini that the executed forms should be sent to defendant and that the policy number to be inserted in the assignment was 1942. (*Id.*, pp. 2a-3a *infra*). Finally, he asked Sterlini to find out for him what the amount of the quarterly premium would be. (*Id.*, p. 3a *infra*). Plaintiff called back later that same day. (*Ibid.*). Sterlini then told him that the quarterly premium would be $321.41. (*Ibid.*).

Plaintiff mailed the request for reduction of the amount of the policy and the assignment form, both executed by the insured, to defendant on March 26, 1964. (*Ibid.*). He enclosed the policy as originally issued in the face amount of $50,000 and a check in the amount of $321.41, the amount of the quarterly premium on the policy as reduced to $35,000. (*Ibid.*). In his covering letter (Exh. "6") he stated that he understood that the amended policy would be mailed to him. (*Ibid.*). He testified that he received the amended policy in the mail on March 27 or 28, 1964. (Tr., p. 26). Sterlini testified that he sent the policy, not to Wolfman, but to the New York agent (*id.*, p. 12), and he offered to testify that the agent delivered the policy to the insured in New York (Exh. "2", para. 4). On objection by plaintiff's counsel, the latter part of his testimony was stricken. (Tr., p. 8). Although plaintiff (who had the burden of proof on the issue) reverted to the matter several times, he never identified the sender of the policy and produced neither covering letter nor envelope. He testified that the assignment form was returned to him but admitted that the policy arrived in a different envelope. (Tr., p. 27).

There were no other communications from defendant to plaintiff except two letters about premium payments, and both of those were sent in response to inquiries by defendant. (Op., pp. 3a-4a *infra*).

The insured died on February 10, 1965. (Exh. "J" to Exh. "2"). On the death certificate, the cause of his death was given as: fatty liver, gastro-intestinal hemorrhage, ethanolism. (*Ibid.*). Investigations made on defendant's behalf disclosed that when insured applied for the policy, he had, although denying it in his application, been treated for acute gastritis, hepatitis, pulmonary emphysema and

chronic alcoholism. (Exh. "2", p. 4). Consequently, defendant refused to pay the proceeds of the policy. (*Ibid*).

Plaintiff instituted the instant action to recover the proceeds of the policy on July 6, 1965. Defendant interposed a plea in abatement, claiming that the court did not have personal jurisdiction of defendant, a foreign corporation not licensed to do or doing any business in Massachusetts. Defendant contended that (a) the Massachusetts statute did not purport to confer jurisdiction on facts such as these and (b) if it did, it would, to that extent, be void as violative of due process, guaranteed to defendant by the Fourteenth Amendment, citing *McGee* v. *International Life Insurance Co.*, 355 U. S. 220 (1957), and *Hanson* v. *Denckla*, 357 U. S. 235 (1958). (Defendant's Requests for Rulings; Tr., pp. 30-33).

A hearing was had on the plea in the Superior Court before Judge Kalus on October 20 and 21, 1965. On October 26, 1965, the judge overruled the plea, but he referred his decision to the Supreme Judicial Court for its determination of the propriety of his findings and rulings. Judge Kalus' report reads as follows:

> "This cause came on to be heard before me on defendant's Answer in Abatement and Plea to the Jurisdiction, which I overruled on October 26, 1965.
>
> Being of opinion that the propriety of my Findings and Rulings overruling said Answer in Abatement and Plea to the Jurisdiction ought to be determined by the Full Court before any further proceedings be had, I hereby report this case to the Full Court for its determination on plaintiff's Declaration, defendant's Answer in Abatement and Plea to the Jurisdiction, the evidence taken, plaintiff's Requests for Rulings of Law, defendant's Requests for Rulings, and my aforementioned Findings and Rulings.

All further proceedings in this Court, except such as are necessary to preserve the rights of the parties, are hereby stayed.

HARRY KALUS
Justice of the Superior Court

Entered: November 23, 1965."

In its brief in the Supreme Judicial Court, and again upon the argument, defendant renewed its contention that, if the statute were construed to confer jurisdiction on the facts here presented, it would be void as repugnant to the Fourteenth Amendment.

The Supreme Judicial Court affirmed the judgment of the Superior Court in a decision filed on April 7, 1967. (Pp. 1a-13a, *infra*). The Court's decision of the federal question is prefaced "The Requirements of Due Process". (Pp. 9a-13a, *infra*). On that issue the Court concluded:

> "We recognize that no activity of Modern Life induced Wolfman to acquire his interest in the insurance contract. But he acquired an enforceable right under the policy only because of and in the course of business dealings in Massachusetts. Modern Life took its part in those dealings to serve its own interest in conducting its business appropriately and conveniently for those concerned with its product. This met the test of voluntary, purposeful activity, and to the extent that the test of inconvenience is applicable, such inconvenience as is suggested does not make it unfair to rule that G. L. c. 175B as applied to Modern Life on the facts is constitutional. We rule that it is."
> (*Infra*, p. 12a).

The Question Presented Is Substantial

Since this Court's decision in *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), the test for compatibility with the Due Process Clause of a state enactment conferring personal jurisdiction on its courts over a foreign corporation not otherwise amenable to suit in that state is whether the corporation has exercised the privilege of conducting activities within that state and has incurred obligations arising out of or connected with those activities. 326 U. S. at 319. If so, a procedure which requires the corporation to respond to a suit brought to enforce those obligations will, in most instances, not be considered to be undue. *Id.* at 319. The activities must be such as to establish sufficient contacts or ties with the forum state to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which the corporation has incurred there. *Id.* at 320.

This Court subsequently held, in *McGee* v. *International Life Insurance Co.,* 355 U. S. 220 (1957), that a life insurance company may be subjected to suit in the state of residence of its insured where the insurance contract was solicited and delivered there, albeit by mail, the premium payments were mailed from there and the insured died there.

McGee represents the limit to which this Court has gone. In *Hanson* v. *Denckla,* 357 U. S. 235 (1958), the Court, responding to an argument based on *McGee,* warned that "* * * it is a mistake to assume that this trend [of expanding personal jurisdiction over non-residents] heralds the eventual demise of all restrictions on the per-

sonal jurisdiction of state courts." 357 U. S. at 251. (citation omitted). The Court continued:

> "Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 319." 357 U. S. at 251.

The Court distinguished *Hanson* from *McGee* by the fact, among others, that in *Hanson* (as in the case at bar), there was no solicitation of business in the forum state, either in person or, as in *McGee*, by mail. *Id.* at 251. The exercise of jurisdiction in Mrs. McGee's action was justified by the interest California has in providing effective redress for its residents when nonresident insurers refuse to pay claims on insurance they have solicited in that state. *Id.* at 252.

Whatever the ultimate limit of the *International Shoe* doctrine as applied to foreign insurers is thought to be, it has never been doubted, as far as we are aware, that where the policy is issued to the insured in one state and the insured thereafter takes up residence in another state, his residence in the latter state does not justify the exercise of personal jurisdiction by the courts of that state over the insurer in an action on the policy. The insured cannot expand the jurisdiction to which the insurer is subject by removing himself and the policy to another state. It will not do to say that the company must reasonably foresee that its insured may move to any

one of the fifty states and that therefore a contact of sorts may be established by the insurer with that state, for it is not on such contacts that jurisdiction is founded. The contacts which justify assumption of jurisdiction over a foreign insurer not otherwise amenable to suit are those created by its exercise of the privilege of conducting business activities within the state, *International Shoe Co.* v. *Washington, supra,* not those created by the exercise by the insured of his right of locomotion. In the words of the District Court in *Southern Machine Company, Inc.* v. *Mohasco Industries, Inc.*, 263 F. Supp. 164 (E. D. Tenn. 1967):

> "* * * Of course, any unilateral action by the plaintiff cannot satisfy the requirement of contact with the forum state. Hanson v. Denckla, supra." 263 F. Supp. at 167.

If the insured, having obtained insurance in one state, cannot create jurisdiction over the insurer in another state by removing himself and the contract to that state, *a fortiori,* he cannot create jurisdiction in the other state by removing the contract, alone, to that state, as by assignment. But that is precisely the effect of the ruling made by the state courts in the instant case.

The Massachusetts courts fastened upon plaintiff's testimony that he had received the policy in the mail and held that defendant delivered the policy to plaintiff, the assignee, in Boston. (Op., pp. 6a-7a *infra*). That finding, we respectfully submit, is not supported by evidence in the record. This Court must in proper cases review the evidence to determine whether the record constitutionally supports the judgment rendered. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, at 285 (1964). Defendant's registrar testified that he sent the policy to the broker in New York, and he offered to prove that the agent delivered the policy to the

insured in New York. (Tr., p. 12; Exh. "2", p. 3). Plaintiff, who had the burden of proof on the issue, *Smeltzer* v. *Deere and Co.*, 252 F. Supp. 552 (W.D. Pa. 1966); see *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269 (1936), testified that defendant had promised to send the policy to him, but he did not say from whom he received the policy. Moreover, the Court's finding that delivery took place in Massachusetts, even though the policy may have been mailed by defendant to the New York agent and by him to plaintiff (Op., p. 7a, *infra*), is not supported by the law of New York, the law upon which the Supreme Judicial Court purported to rely. (*Ibid.*). Under New York law, delivery by an insurer of a policy to an agent of the insurer after the first premium has been paid and the application approved constitutes delivery to the insured. *Jones* v. *Metropolitan Life Ins. Co.*, 158 Misc. 466, 286 N.Y.S. 4, at 7-8 (App. Term, 1st Dept. 1936). It follows that such delivery of the policy to the agent constitutes delivery to anyone, such as an assignee, to whom the insured had relinquished his right to the policy. Inasmuch as plaintiff had forwarded the first premium to defendant with his letter of March 26, 1964, defendant's subsequent mailing of the policy to its agent was effective delivery of the policy to plaintiff in New York.

Even if there had been convincing proof that defendant had delivered the policy in Massachusetts and, even if the governing law had supported the finding of a delivery there, no basis for the exercise of jurisdiction over defendant would have been established thereby, for defendant would have made such delivery, not for the purpose of exercising the privilege of doing business in Massachusetts, but for the purpose of carrying out the instructions of its insured, who had the right to assign the policy to whomever he liked in whatever state he should choose.

This is a far cry from the solicitation of insurance business in California by International Life Insurance Company of Texas which provided the basis for the exercise of jurisdiction in *McGee*. The facts in the instant case are much more like those presented in *Hanson*, where it was shown that the trust agreement in suit had been executed in Delaware by a Pennsylvania resident and that the settlor later moved to Florida. There were subsequent dealings between the settlor in Florida and the trustee in Delaware, as there were between plaintiff in Massachusetts and defendant in New York in the case at Bar, but this Court refused to allow Florida to exercise personal jurisdiction over the trustees. The Court distinguished *McGee*, not only by the fact that the insurance business is one affected with a special public interest, but *also* by the facts that:

> "• • • The first relationship Florida had to the agreement was years later when the settlor became domiciled there, and the trustee remitted the trust income to her in that State. From Florida Mrs. Donner carried on several bits of trust administration that may be compared to the mailing of premiums in *McGee*. But the record discloses no instance in which the *trustee* performed any acts in Florida that bear the same relationship to the agreement as the solicitation in *McGee*. Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida. Cf. *International Shoe Co.* v. *Washington*, 326 U. S. 310, 319."
>
> 357 U. S. at 252. (Footnotes omitted).

The Supreme Judicial Court was led to the conclusion that due process was afforded in the case at Bar by the following reasoning:

> "We think, however, that acts other than selling a policy may be voluntary business activity within the rule. Wolfman suggests that Modern Life could have declined to deal at all with Wolfman in Massachusetts. We agree with Modern Life that this would not have been a reasonable way to conduct its business. But this is so because it was doing business in the United States, across State lines, and to require that persons dealing with it come to New York would have adversely affected that business. Modern Life dealt with Wolfman in the way it did because of the way it chose to do business generally. We rule that this was 'purposefully . . . [availing] itself of the privilege of conducting activities within the forum State.'" (*Infra*, pp. 11a-12a).

Defendant will argue on this appeal that if the court's reasoning were adopted, it would lead to nothing less than the complete abandonment of the territorial restrictions upon the power of the states to exercise judicial jurisdiction over foreign corporations. To say that, if a corporation does business *generally* across states lines, it may be subjected to jurisdiction in any State where an assignee of a cause of action against it happens to reside, at least if it recognizes his rights as assignee, is to do away entirely with the conduct-of-activities theory, the very thing against which this Court warned in *Hanson* v. *Denckla*, *supra*. Although the door of non-resident jurisdiction has been opened wider by *International Shoe* and *McGee*, it has not been removed from its hinges. *Dooly* v. *Payne*, 326 F.2d 941, 943 (5th Cir. 1964). To suggest, as did the Supreme Judicial Court, that defendant has the option of refusing to deal with out-of-state assignees is to offer defendant a Hobson's choice. The insured has a right to

assign the contract unless the policy provides otherwise. 16 Couch on Insurance 2d §63:16 (1966); *Olmsted* v. *Keyes*, 85 N.Y. 593 (1881). No insurance contract could be sold with a provision prohibiting assignment to persons resident in (or who may in the future become resident in) another state. In any event it cannot be argued reasonably that the issuance of a policy of life insurance without such a restriction is an act by which the insurer exercises the privilege of doing business in all of the fifty states.

If we are right in the foregoing, it can make no difference that defendant registered the assignment on its books and had the kind of communications with plaintiff that an insurance company normally has with the assignee of one of its policies. Defendant did not by those acts exercise any privilege of doing business in Massachusetts but simply recognized the *fait accompli* of the assignment.

The activities of the insurer in the forum state are not the only factor which enters into the determination whether assumption of jurisdiction is fair and just. The facilities of the parties for conducting litigation in the two possible forums are also relevant. See *McGee* v. *International Life Ins. Co.*, *supra*, 355 U.S. at 223, 224. The interest of the forum state and the fairness of trial there are the bases for the jurisdiction. *Rosenblatt* v. *American Cyanamid Co.*, 86 S. Ct. 1 (1965). The latter element has been aptly referred to as the "balance of conveniences of the parties in conducting the lawsuit in a given forum." *Blount* v. *Peerless Chemicals (P.R.) Inc.*, 316 F.2d 695, 697 (2d Cir. 1963); *Hutchinson* v. *Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930). In the case at Bar, those factors decidedly point to a New York forum. The witnesses and evidence are there located, and plaintiff cannot argue that

he will suffer any hardship if he has to pursue his remedy in New York:

(1) The application was made in New York (Ex. 1, p. 1).

(2) The medical examination took place in New York (Ex. 1, p. 2). Dr. Arthur Hecht, the examining physician, who may be an important medical witness at the trial, has his office in New York. (*Ibid.*).

(3) The insured died in New York. (Exh. "J" to Exh. "2").

(4) The certificate of death was executed in New York and filed with the Bureau of Records and Statistics in the Department of Health of the City of New York. (*Ibid*).

(5) The proof of death was dated in New York and signed by plaintiff in New York. (*Ibid.*). The claim was presented to defendant by plaintiff's New York counsel. (Covering letter, *ibid.*).

(6) The policy was issued in New York. (R. 7).

(7) Because the contract sued on here was made in New York, the effect of Stricker's representations in his application is governed by New York Insurance Law, § 149. *West Side Motor Express, Inc.* v. *Finance Discount Corp.*, 340 Mass. 669, 671 (1960).

For the foregoing reasons, the Court should conclude that the Court has jurisdiction and that a substantial

question is presented requiring plenary consideration with briefs on the merits and oral argument for its resolution.

Respectfully submitted,

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